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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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MILDRED PERRY,

Petitioner

vs.

CAROLE HOWES, Warden, Florence
Crane Women's Correctional Facility,

Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

Petitioner Mildred Perry was tried in state court for murder and convicted. Habeas corpus was denied in federal court. The questions presented are:

1. WHERE, DURING JURY DELIBERATIONS, THE PROSECUTOR COMMUNICATED WITH AND PRESENTED EVIDENCE TO THE JURY, IN THE ABSENCE OF THE JUDGE AND DEFENSE COUNSEL,

DID THIS VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND THE RIGHT TO COUNSEL AT A CRITICAL STAGE OF THE TRIAL?

2. WHERE THERE WAS A FAILURE OF THE COURT REPORTER TO RECORD OR TRANSCRIBE MANY PORTIONS OF THE TRIAL, INCLUDING THAT PORTION WHERE THE PROSECUTOR ADDRESSED THE JURY IN THE COURTROOM WITH NEITHER JUDGE NOR DEFENSE COUNSEL PRESENT,

DOES THE LACK OF ANY RECORD OF THESE PORTIONS OF THE TRIAL DENY PETITIONER DUE PROCESS OF LAW?

3. WHERE THE TRIAL JUDGE SINGLED OUT WITNESS CHARE KNIGHT FOR A WARNING THAT IF HE TESTIFIED HE WOULD BE GIVEN A LIFE SENTENCE FOR PERJURY, AND WHERE THIS WARNING SCARED

WITNESS KNIGHT OFF THE WITNESS STAND

DID THE JUDGE'S THREATS TO THE WITNESS DENY PETITIONER HER RIGHT TO A FAIR TRIAL?

4. WHERE THE POLICE HYPNOTIZED A WITNESS, BUT THERE WAS NO RECORD OF HER PREHYPNOTIC MEMORIES, AND OTHER SAFEGUARDS WERE NOT FOLLOWED,

DID THE ADMISSION OF HYPNOTICALLY INDUCED TESTIMONY DENY PETITIONER DUE PROCESS OF LAW?

5. WHERE THE PROSECUTOR OBSERVED THAT WITNESS KNIGHT WAS PREPARED TO TESTIFY UNTIL THREATENED BY THE JUDGE,

DID THE PROSECUTOR DENY PETITIONER A FAIR TRIAL BY TELLING THE JURY WITHOUT EVIDENCE AND OVER OBJECTION THAT THE REASON FOR KNIGHT'S REFUSAL TO TESTIFY WAS THREATS BY PETITIONER, AND BY OTHER IMPROPER ARGUMENT?

6. WHERE A TRANSCRIPT FROM THE PRELIMINARY EXAMINATION TESTIMONY OF A WITNESS WAS READ TO THE JURY,

DID THE FAILURE TO DELETE OBJECTIONABLE MATERIAL TO WHICH OBJECTION WAS SUSTAINED AT THE EXAMINATION DENY PETITIONER DUE PROCESS OF LAW?

7. WHERE THE JURY REQUESTED TO HAVE THE TESTIMONY OF 5 WITNESSES REREAD, BUT THE JUDGE WOULD ALLOW ONLY THE REREADING OF THE ONE WITNESS MOST DAMAGING TO PETITIONER,

DID THE JUDGE ABUSE HIS DISCRETION AND DENY PETITIONER DUE PROCESS OF LAW?

8. DID PETITIONER RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL?

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

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MILDRED PERRY, Petitioner, by and through her attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued July 19, 1988.

## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of July 19, 1988 is reprinted as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan of November 18, 1986 is reprinted as Appendix B.

## STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit was entered July 19, 1988. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...and to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

Petitioner Mildred Perry was jury tried in Wayne County Circuit Court, a state court of Michigan, before the Hon. Horace Gilmore. She was convicted of second-degree murder and conspiracy to commit second-degree murder in connection with the shooting death of her husband Rothbe Elwood Perry. Petitioner was subsequently sentenced to to concurrent life terms of imprisonment.

The Michigan Court of Appeals in People v. Perry, 115 Mich. App. 533, 321 N.W.2d 613, 620 (1980),vacated petitioner's conviction for conspiracy to commit second-degree murder and affirmed Petitioner's conviction for second-degree murder. The Michigan Supreme Court in People v. Perry, 417 Mich. 908, 330 N.W.2d 852 (1983), 422 Mich. 882, 367 N.W.2d 68 (1985), remanded Petitioner's case back to the Michigan Court of Appeals twice for a determination of the propriety of admitting hypnotically induced testimony of Christine Brandon. Each time the Michigan Court of Appeals affirmed the Petitioner's conviction. People v. Perry, 126 Mich. App. 86, 337 N.W. 2d 324 (1983); People v. Perry,144 Mich. App. 420; 375 N.W.2d 10 (1985). Petitioner applied for leave to appeal a third time in the Michigan Supreme Court which was subsequently denied.

Petitioner then brought the present federal action for a writ of habeas corpus in the United States District Court for the Eastern Division of Michigan which was denied. The order denying habeas relief was affirmed by the United States Court of Appeals for the Sixth Circuit.

Petitioner Perry was jointly tried with Robert Jackson, whose reversal was upheld by this Court in Michigan v. Jackson, 475 U.S. 625 (1986).

Alice Schwartz, a neighbor of the Petitioner, testified that on July 12, 1979 at 4:30 a.m. the petitioner was knocking on her door screaming for help and saying someone broke into her house and shot her husband. (T V,15-17).

Douglas Smith, a police officer, testified that he responded to the petitioner's home, and found Petitioner's husband laying on the bed in the bedroom with gunshot wounds inflicted. (T V, 111-112).

Jeanette Tonilas testified that she was employed at Jacobson's in Dearborn and on July 11, two black men came in and asked for Petitioner who was employed there. One of the men was identified as Defendant Jackson.(T VIII, 11-13).

Yuki Brooks testified that she worked in a cafe a couple of blocks from Jacobson's and on July 11, 1979, Petitioner and defendant Jackson and another black male came in and ordered cokes.(T VIII, 26).

Christine Brandon, the niece of petitioner, testified the petitioner told her she was going to have the deceased beat up. The witness also testified after the deceased was shot a man by the name of "Charles" called her house several times looking for the petitioner. (T X, 41).

Witness Chare Knight, had entered into a plea bargain under which he was to testify at the preliminary examination and at petitioner's trial. (T X, 79). Prior to the trial Knight withdrew his plea of guilty and asserted his Fifth Amendment right to remain silent. (T X, 83). Knight subsequently indicated that although his attorney advised against it, he would testify at Petitioner's trial. (T X, 78-79).

Knight was present in court and prepared to testify. Before the judge allowed Knight to testify, he warned Knight that he could receive a life imprisonment term for perjury. (T X, 82-83). Knight then refused to testify.

Previous testimony of Knight implicating Petitioner in a plot to kill her husband was provided to the jury, however, it was not transcribed. (T XI, 79).

Mr. Knight's testimony was read to the jury twice, once during the presentation of the state's evidence and once after the jury had retired to deliberate. When it was read to the jury for the second time, it was read to the jury by the prosecutor

outside the presence of the judge and defense counsel. (See T XXV, 152-154).

In closing argument, the prosecutor told the jury over objection that Chare Knight refused to testify because he was afraid of the Petitioner, because of threats Knight allegedly received while in custody. (T XXIV, 22, 73-74).

Petitioner took the stand in her own defense. She testified that she never arranged to have her husband killed, but only to have him beaten, as her spiritual adviser Sylvia had recommended as a means of getting him back. (T XX, 26, 70-94). Petitioner was surprised and awakened by the gunshots, followed by a person appearing in her bedroom and demanding money. She testified that she left some money on a chair before running into her husband's bedroom where she found him bleeding. (T XX, 99-109).

## REASONS FOR GRANTING THE WRIT

**Questions 1 and 2: Absence of defense counsel and judge during critical stage of the case, while prosecutor communicated with the jury, and lack of transcript record of this and other portions of the trial, denied Petitioner the right to counsel, a fair trial, and due process of law.**

Petitioner Mildred Perry was convicted of second degree murder in the death of her husband of her husband in a state court of Michigan. The conviction was based largely on the transcript of the preliminary examination testimony of Chare Knight, a witness who refused to testify at trial.

During the deliberations of the jury, there was a request to reread testimony. In the absence of defense counsel and the judge, the prosecutor communicated with the jury, purportedly rereading the testimony of Chare Knight. This was a lengthy proceeding apparently taking several hours, because the exam transcript of Knight was 250 pages long. (See T XXV, 152-154). The court reporter failed to transcribe any of this proceeding.

A Petition for Writ of Habeas Corpus claimed inter alia that Petitioner was deprived of her due

process rights and right to counsel when the prosecutor made this communication without the benefit of a judge, defense counsel, or a court reporter. The Sixth Circuit rejected those claims, finding that the presence of the Petitioner and a non-attorney employee of defense counsel rendered any error harmless.

The Sixth Circuit ruling conflicts with numerous cases decided by the federal courts, including Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648 ; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984); Silverson v. O'Leary, 764 F.2d 1208 (7th Cir. 1985); Young v. Duckworth, 733 F.2d 482 (7th Cir. 1984); as well as the Sixth Circuit case of Green v. Arn, 809 F.2d 1257 (6th Cir. 1987). These cases hold that defense counsel's absence during a critical stage of a trial denies the basic Constitutional guarantee that a criminal defendant shall enjoy representation by defense counsel during her trial.

As the Court held in United States v. Cronic, 466 U.S. 648; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984), decided on the same day as Strickland:

> "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of . . . trial."

The holding in Cronic has been followed by the Sixth Circuit in at least one case, Green v. Arn, supra, in which the Court held:

> "Where the Sixth Amendment claim is the denial, rather than the ineffective assistance of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a matter of law, and prejudice is presumed."

In accord on the presumption of prejudice, see Strickland, 104 S.Ct. at 2067; Dillon v. Duckworth, 751 F.2d 895, 898 n. 2 (7th Cir. 1984).

The Sixth Circuit ruled that the presentation of testimony to the jury by the prosecutor did not constitute a critical stage of the proceedings. This remarkable ruling demonstrates the great need for this Court to revisit the question of what is a critical stage of the proceedings, because the lengthy, untranscribed communication with the jury during deliberations was indeed a stage "where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226-227; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967).

This is particularly so in light of the absence of the judge. Prior cases suggest that the presence of the judge is a constitutional necessity. See, e.g., Glasser v. United States, 315 U.S. 60, 71; 62 S. Ct. 457; 86 L.Ed. 680 (1941); Capitol Traction Company v. Hof, 174 U.S. 1, 13-14 (1899).

In this case, the jury requested a rereading of testimony, thereby indicating that they were very likely to be influenced by what they were to hear.

In this case, the prosecutor, the only lawyer present in the courtroom, necessarily played a triple role, that of judge, defense counsel and prosecutor. The prosecutor as prosecutor proposed that he and not some neutral person present the testimony to the jury. The prosecutor as judge agreed with that procedure and oversaw his own actions. The prosecutor as defense counsel apparently chose to raise no objections to the prosecutor's actions.

Of course, the real defense counsel could not object to the tone, manner, or content of what was said by the prosecutor to the jury as he made his presentation to an eagerly awaiting jury, because he was not there. Nor could any objection have been ruled upon even if made because there was no judge.

A lawyer is an advocate, and as an advocate cannot reasonably be permitted to have ex parte contact with the jurors at any time, much less during deliberations. Can we presume that the prosecutor

gained no benefit from the absence of opposing counsel for hours? Is such a presumption consistent with what we know about attorneys? Can attorneys representing parties be consistently relied upon to lack any partisanship in their presentations?

The communication of one attorney with the jury during deliberations, in the absence of a judge or opposing counsel, is a situation rampant with opportunities for abuse. Moreover, we have no record of what actually transpired as the prosecutor communicated with the jury. Did he argue his case to the jury? Did he speak any words not written? Did he delete anything, or add comments designed to help his side of the case? Did he use tone of voice to try to sway the jury during this most critical moment in the trial?

The act of single-handedly conducting a court proceeding for the jury necessarily adds to the power and prestige of the attorney in the eyes of the jury.

The jury request indicates that the jury was undecided and in a position to be swayed. If the reading of the testimony the first time was a critical stage of the trial, then why would the rereading during the delicate and crucial stage of jury deliberation suddenly become unimportant? This lengthy, untranscribed communication with the jury during deliberations was indeed a stage "where counsel's absence might derogate from the accused's

right to a fair trial." United States v. Wade, supra.

Indeed, if this were not a critical stage of the proceedings, the Petitioner herself would have no right to be present. Illinois v. Allen, 397 U.S. 337; 90 S.Ct. 1057; 25 L.Ed.2d 353 (1970). If the instant case remains good law in the Sixth Circuit, then we may as well allow prosecutors to enter the jury room at will to communicate with them, because if there is no right to have a judge or defense counsel present, it is not a critical stage at which a defendant must be present.

The Sixth Circuit ruled that "Petitioner has not suggested that anyone in the courtroom did anything improper." That is precisely why a lawyer was needed. We submit that it is not the province of a criminal defendant to determine the propriety of prosecutor actions; it is the province of defense counsel. An untrained criminal defendant has no basis on which to judge whether the prosecutor's actions with the jury were illegal or objectionable. That is why she is entitled to a defense lawyer present on the spot to object while information is being given to the jury, and is entitled to a judge to hear objections.

Of course, the total absence of a record means that Petitioner has been denied "a record of sufficient completeness to permit proper consideration of [her] claims," Mayer v. Chicago, 414 U.S. 189; 92 S.Ct. 410;

39 L.Ed.2d 378 (1978). In addition to the instances discussed above, there were numerous instances of tape recordings of witness statements being presented to the jury with no transcription of what was heard. (T XIII, 6; T XV, 45; T XXII, 4). Further, the original reading of Knight's testimony was not transcribed. (T XI, 79). This means that those portions of the trial are effectively unreviewable on appeal or now.

Here, unlike in Silverson, there is substantial doubt as to what was said to the jury, because of the absence of record. Here, as in Cronic, the prejudice is legally presumed when there has been an actual or constructive denial of the assistance of counsel, as opposed to a claim of ineffective assistance of counsel who is present.

It is difficult to imagine a more critical stage of the trial than the presentation of evidence to the jury on a defendant's guilt, from the mouth of the very prosecuting attorney who was trying to achieve a guilty verdict.

## Question 3: The action of the trial judge in singling out witness Chare Knight and chasing him off the witness stand with threats of life imprisonment.

Witness Chare Knight had entered into a plea

bargain under which he was to testify at the preliminary examination and at petitioner's trial. (T X, 79). Prior to the trial Knight withdrew his plea of guilty and asserted his Fifth Amendment right to remain silent. (T X, 83) Knight subsequently indicated that although his attorney advised against it, he would testify at Petitioner's trial. (T X, 78-79).

Knight was present in court and prepared to testify. Before the judge allowed Knight to testify, he warned Knight that he could receive a life imprisonment term for perjury. (T X, 82-83). Knight then refused to testify, leaving his preliminary examination testimony available for the jury without any opportunity for the jury to view his demeanor under cross-examination.

The trial judge's warning to Knight violated Petitioner's due process rights as discussed in Webb v. Texas, 409 U.S. 95; 93 S.Ct. 351; 34 L.Ed.2d 330 (1972). In Webb, the trial judge told a witness that he had been called as a witness by the defendant, that he had a right not to testify, that anything he said might be used against him, and that if the witness 'lied under oath, the Court will personally see that your case will go to the grand jury and you will be indicted for perjury', etc. This chased the witness off the stand.

In reversing the conviction, this Court said:

> "The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of necessity to tell the truth. Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied he would be prosecuted and probably convicted for perjury, and the sentence for that conviction would be to impair his chances for parole...
>
> In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the witness stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."

Knight wanted to testify in petitioner's trial. (T X, 78). But, after the trial court's threats, Knight declined to testify. (T X, 83). The threats made to witness Knight by the trial judge were indistinguishable from those in Webb v. Texas.

Knight's testimony at petitioner's trial was of critical importance. That testimony would allow petitioner the opportunity to fully cross-examine Knight. It is well known that lawyers generally do not come to preliminary examinations as fully

prepared for cross-examination as at trial, and that in effect Knight had not been fully cross-examined at preliminary examination. (T IX, 68-81).

Further, testimony from Knight was critical on the question of whether Knight was induced to give false testimony at the preliminary examination in return for a light plea and sentence.

The Sixth Circuit denied relief (Appendix, A-16) by speculating that Knight was "probably" going to commit perjury, and implicitly finding that the preliminary examination testimony of Knight was the truth, and that anything else would therefore be a lie. However, this Court expressly rejected such reasoning in Webb v. Texas.

The Sixth Circuit reasoning essentially holds that if it is suspected that a witness's testimony will differ in any way from that given at the preliminary examination, the jury does not have the right to choose between the competing stories, but must hear only the version that most seriously implicates the defendant. Petitioner submits that under Webb, due process requires that the jury and not the judge must choose which testimony to believe. Evidently, the principles of Webb v. Texas are becoming lost in the cobwebs of time, and action by this Court is necessary to reaffirm and revitalize them.

## Question 4: The admission of testimony of a hypnotized witness, where recognized safeguards were not followed, and where pre-hypnosis memories were not preserved.

The admission of the hypnotically refreshed testimony of the Petitioner's niece, Christine Brandon, denied her a fair trial. Witness Brandon gave statements to the police on July 27, 1979 and July 29, 1979. (T X, 69). These statements were not recorded in any way but, presumably, they were not very incriminatory of Petitioner, or there would have been no need to hypnotize her.

In August 1979, Brandon, accompanied by two police officers, Sergeants Ericson and Hoff of the Livonia Police Department, and Charles Seller, the prosecutor, went to Lansing, where Brandon was hypnotized by Gary Powell. Brandon was hypnotized at the request of the police and prosecutor. (T XXIV, 13). Sgts. Ericson and Hoff and Mr. Seller were present during the hypnotic session, which lasted three or four hours.

At trial, there was an objection to the admission of Brandon's testimony as to her recollection after being hypnotized, which was overruled. (T VIII, 83).

Petitioner claimed that the admission of the

testimony of Brandon denied due process and the right of confrontation. The Sixth Circuit affirmed the denial of habeas corpus relief, largely on the basis of Rock v. Arkansas, 483 U.S. ___, 107 S.Ct. ___, 97 L. Ed.2d 37 (1987). In Rock, a majority of this Court held that hypnotism of the defendant would not preclude his becoming a witness. However, this holding was not based on the reliability of hypnotically induced testimony, but on the constitutional right of a defendant to testify. Indeed, in Rock both the majority and the dissent agreed generally that post-hypnosis testimony presented substantial problems of reliability. Because Rock is taken by the Sixth Circuit as license to admit all hypnotically induced testimony, in apparent disregard of both the majority and dissenting positions in Rock, the issue of hypnotized witnesses requires Supreme Court review.

This Court is well aware of the multitude of cases from around the country dealing with the complex issue of hypnosis, and a Petition for Certiorari is not an appropriate place for counsel to review them all. However, the growing number of hypnosis cases makes the instant issue one which is very much a timely issue for review. The confusion which Rock has apparently engendered also makes this an ideal time to explore the question.

Petitioner would note that many courts have

ruled out testimony by hypnotized witnesses altogether, while other courts which have admitted such testimony have discussed with approval the standards of State v. Hurd, 86 N.J. 525; 432 A.2d 86 (1981) for use of hypnosis in criminal investigations. In this case, there was a violation of standard 2 (the hypnosis was conducted by a prosecution agent), standards 3 and 4 (there was no record of the pre-hypnosis memories), standard 5 (there was no recording of the hypnotic session) and standard 6 (persons other than the hypnotist and subject were present). On a factuai level, this case is therefore ideal for review.

In this case, witness Brandon made a post-hypnotic statement that what she told the police before she was hypnotized was the same as what she told them after she was hypnotized. (T X, 74). However, the very nature of hypnosis makes such testimony unreliable.

In Rock v. Arkansas, supra, this Court discussed three characteristics of hypnosis which may lead to the introduction of inaccurate memories.

1) Under hypnosis, the subject becomes "suggestible", and may try to please the hypnotist with answers the subject thinks will meet with approval.

2) The subject is also likely to

"confabulate", to fill in details from the imagination to make an answer more coherent and complete.

3) The subject experiences "memory hardening". This gives the subject great confidence in both true and false memories, making effective cross-examination more difficult.

**Suggestibility.** Brandon had been interviewed by the police on two occasions before she was hypnotized. Even if the questioning by prosecution agents during the hypnotic session was fully unbiased, the two previous interviews by the police had already revealed to Brandon the police's theory of the killing. Brandon was hypnotized at the request of the police, and the police and prosecutor were present during the hypnotic session. Since a person under hypnosis experiences a compelling desire to please either the hypnotist or others who have stated that it is important to remember certain events, the subject may produce the answers he or she believes are expected.

**Confabulation.** When a hypnotic subject cannot recall details being sought, the subject will unconsciously create answers to the questions the hypnotist asks. Neither the person hypnotized nor

the expert observer can distinguish between confabulation and accurate recall in any particular instance. Since the answers desired by police and prosecutor had already been suggested to Brandon, she may have filled the gaps in her memory with answers suggested in her previous interviews with the police.

**Memory Hardening.** A witness who undergoes hypnosis becomes convinced that the story he or she told under hypnosis is true. The conviction becomes stronger each time the witness repeats the story. Since there is no record of what Brandon said before she was hypnotized, Brandon cannot tell what she remembered before her hypnosis.

Brandon could not be effectively cross-examined as to her recollection of events because of her hypnosis, because there was no record of Brandon's statements to the police before she was hypnotized, there was no way for defense counsel to meaningfully cross-examine her about the statements she made before she was hypnotized. This violates the Sixth Amendment right to confrontation. Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974).

Petitioner submits that there is a present need for the highest court in the land to review the extent

to which the admission of post-hypnotic testimony violates the right of cross-examination, and the extent to which it denies the right to due process and a fair trial under the Fourteenth Amendment.

## Question 5: Improper prosecutor argument inventing prejudicial facts for the jury.

In the Sixth Circuit and District Court, Petitioner quoted at length numerous examples of improper argument. The Sixth Circuit denied relief on the ground that the argument in this case was not as bad as that in Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), where that Court also denied relief.

In Cook, there were fire and brimstone arguments condemning the character of the accused. In the instant case, we have a very different situation. Instead of improper slurs on a defendant's character, as in Cook, we have prosecutorial invention of facts, a situation much more akin to Berger v. United States, 295 U.S. 78; 55 S.Ct. 629; 79 L.Ed. 1314 (1935), where this Court held reversal to be necessary.

In this case, the prosecutor repeatedly told the jury that Chare Knight refused to testify because he was afraid of the Petitioner, because of threats Knight allegedly received while in custody. (T XXIV, 22,

73-74). There was no evidence to support this allegation. Moreover, the record plainly shows it to be false, because Knight, unknown to the jury, appeared in court ready to testify, and then refused to testify only because the judge threatened him with life imprisonment. For the prosecutor to present this pack of lies to the jury under the official auspices of his office is a disgrace to civilized procedure and is directly contrary to this Court's holding in Berger v. United States.

The federal courts, until now, have repeatedly held that it is improper for the prosecutor in questioning or argument to insinuate that a criminal defendant is threatening or endangering a witness. See, e.g. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Indeed, the Sixth Circuit itself, in United States v. Peak, 498 F.2d 1337 (6th Cir. 1974), held that reference to threats before the jury was so prejudicial that it could not be cured even by a cautionary instruction. In this case, despite the objection, there was not even a cautionary instruction.

In addition to the invention of threats by the defendant, we also have vouching for the credibility of witnesses, and suggestions that the prosecution had secret evidence undisplayed to the jury that showed that certain prosecution witnesses either were or were not being truthful. The prosecutor also

told the jury that the phrase that Petitioner wanted her husband "beat up" really meant "to kill," but without any testimony whatever that a killing was being discussed or that "beat up" was a code for "kill." The prosecutor's testimony, in the guise of argument, substantially added to the case against Petitioner. All of these comments were objected to, but were denied on the grounds that this was closing argument.

In United States v. Latimer, 511 F.2d 498 (10th Cir. 1975), the Court reversed because the prosecutor told the jury in argument why he had not produced the films from the camera which operated during the charged bank robbery. See also United States v. Whitmore, 480 F.2d 1154 (D.C. Cir. 1973), United States v. Gonzalez Vargas, 558 F.2d 633 (1st Cir. 1977); United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972). Yet, in the instant case, the prosecutor was permitted to blatantly lie to the jury, inventing facts that he knew to be false.

It is unconstitutional to present perjured testimony to the jury, and it therefore is also unconstitutional to present perjured argument to the jury. Giglio v. United States, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972). The prosecutor, having heard of Knight's willingness to testify, and having heard him frightened away, not by the Petitioner, but by the judge, took advantage of the jury's ignorance of these facts to mislead the jury.

The Sixth Circuit apparently believes that since the prosecutor in Cook was permitted to get away with one form of improper argument, that no improper argument can deny due process. This Court should grant certiorari to clarify that a prosecutor cannot make up witness fear of the defendant in order to unfairly paint the defendant as a bad person.

This Court should also grant certiorari to clarify that a prosecutor cannot invent reasons for a refusal to testify to deceive the jury and cover up the genuine reasons. Because the jurors saw that Knight refused to testify, the attribution of this to threats by Petitioner was highly prejudicial. Because the genuine reasons for Knight's refusal to testify were well known to the prosecutor, the argument was plainly a situation where the intent to prejudice the jury by lying to them was manifest. In the United States, the world leader in due process of law, such deliberate, prejudicial misconduct cannot properly be affirmed or ignored without serious damage to the integrity of the judicial system.

**Question 6: Reading the entire transcript of Knight's preliminary examination testimony to the jury, where the transcript included numerous objectionable matters to which objections were sustained at**

**the preliminary examination.**

During the preliminary examination, witness, Chare Knight, testified to what Robert Jackson, petitioner's co-defendant had told him about petitioner. (PET, 147-151) This testimony was certainly hearsay as it related to Petitioner. It was presented for the truth of the matter asserted by Jackson to Knight. Objection to the testimony was sustained. (PET, 151).

Jackson did not testify in Petitioner's trial. Therefore, when the transcript was read to the jury, the jury was permitted to hear inadmissible testimony, without any right to cross-examine either the source (Jackson) or the repeater (Knight). This violates the Sixth Amendment right to confrontation. Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974); Bruton v. United States, 391 U.S. 123; 88 S.Ct. 1620; 20 L.Ed.2d 476 (1968).

We do not know whether there were any objections to this at trial, because the court reporter did not report this portion of the trial. (See T XI, 79).

**Question 7: The denial of a jury request to hear the testimony of 5 witnesses reread, but granting the rereading of witness Knight's preliminary examination testimony.**

Following the completion of proofs and delivery of the jury instructions, the jury requested that the testimony of five witnesses, including Petitioner, be reread. The trial judge denied this, commenting that only Knight's testimony was readily available for rereading. (T XXIV, 112-114).

Not surprisingly, the jury later asked for Knight's testimony to be reread, and this was granted. (T XXV, 152).

The trial judge abused his discretion by invading the fact-finding function of the jury. United States v. United States Gypsum, 438 U.S. 442; 98 S.Ct. 2864; 57 L.Ed.2d 854 (1978). The jury was deliberating and wanted the testimony reread to assist them in their deliberation. To ask the jury to continue deliberating without the necessary testimony they felt they had to have was a abuse of discretion on the part of the trial judge. And, moreover, limited the jury's deliberation considerations to one persons testimony, the preliminary examination testimony of Knight, the most unfavorable testimony to Petitioner. Logic is against the thought that the jury, the next day, simply decided it wanted to hear only the testimony of Chare Knight. The jury clearly knew the other testimony it wanted to review was unavailable by the trial judge's comments towards them, so the jury

picked the only testimony it knew had been transcribed.

This action by the judge was in violation of the ABA Standards on Criminal Justice, §5.2. It was also, an abuse of discretion by the trial judge, depriving Petitioner of a federal constitutional right. United States v. Toney, 440 F.2d 590, 592 (6th Cir. 1971); United States v. Licavoli, 725 F.2d 1040, 1049 (6th Cir. 1984).

## Question 8: Ineffective assistance of counsel.

As argued in the District Court and the Sixth Circuit, counsel was ineffective for absenting himself during a crucial portion of the trial, for not requiring transcription of various portions of the trial, for not insisting on the judge's presence during a crucial portion of the trial (perhaps because he did not want to be there himself), and for other failures to object.

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel at trial. Certainly, this issue is an active one in the recent history of Supreme Court jurisprudence. Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); Kimmelman v. Morrison, 477 U.S. ___; 106 S.Ct. ___; 91 L.Ed.2d 305 (1986).

In this case, it appears that counsel may have

had a conflict of interest. He failed to stay in court to protect his client's interests because he had someplace else he wanted to be. If he had not had that conflicting interest, Petitioner's right to counsel may have been protected.

This case is an appropriate vehicle for review of the ineffective assistance of counsel question.

## Conclusion.

Petitioner Mildred Perry respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: October 12, 1988

No. 86-2131
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILDRED PERRY,
Petitioner-Appellant

v.

On Appeal from the United States District Court for the Eastern District of Michigan.

CAROL HOWES, WARDEN,
Respondent-Appellee.

Decided and Filed

BEFORE: MARTIN, WELLFORD and NELSON, Circuit Judges.

PER CURIAM. Imprisoned by the State of Michigan on a conviction for the second-degree murder of her husband, petitioner applied for federal habeas corpus relief. The district court declined to issue the writ, and petitioner has appealed. We shall affirm the judgment of the district court.

I

The petitioner, Mildred Perry, was sentenced to two concurrent terms of life imprisonment after a

Wayne County Circuit Court jury found her guilty of murder in the second-degree and conspiracy to commit second-degree murder. Petitioner and the alleged triggerman, Robert Jackson, were tried together before different juries.

The testimony at trial showed that petitioner's husband had been seeing another woman. Distraught over her husbands affair, petitioner called the other woman, Claire Miller, and asked her if she knew "that in the Detroit area for six hundred dollars or less you can have anyone eliminated that you want." In a later conversation petitioner told Ms. Miller that she couldn't "stand the humiliation of a second divorce" and "would rather see [her husband] dead that with another woman." Ms. Miller testified that she and Mr. Perry had been planning to start a vacation together in Baltimore shortly before Mr. Perry was shot. There was evidence that petitioner had met with Mr. Jackson and another man the day before the shooting.

There were two witnesses whose testimony figures prominently in the petitioner's assignments oferror here. The first, Mr. Chare Knight (also called Charles Knight), had been indicted for first-degree murder. Mr. Knight agreed to testify at a preliminary hearing and at the trial of petitioner and Mr. Jackson in exchange for being allowed to plead guilty to a reduced charge of second-degree murder.

At the preliminary examination Mr. Knight testified that petitioner had contacted him about arranging the murder of her husband. Knight said that he and Jackson met with petitioner on at least two ocassions, and once drove past the Perry home to show Jackson where it was. Mr. Knight also testified that Robert Jackson later told him he had murdered petitioner's husband and received payment from the Petitioner for doing so.

Mr. Knight repudiated his plea bargain before petitioner's trial and indicated a willingness to testify on behalf of petitioner and Mr. Jackson. When Mr. Knight's attorney informed the circuit Court of his client's change of heart, the court warned Knight about the dangers of committing perjury. Knight then declined totestify, asserting his privilege under the Fifth Amendment. Finding that Mr. Knight was "unavailable" under the Michigan Rules of Evidence, the court allowed the jury to hear the transcript testimony given by Mr. Knight at the preliminary examination.

Mr. Knight's testimony was read to the jury twice, once during the presentation of the state's evidence and once after the jury had retired to deliberate. After beginning its deliberations the jury asked the trial judge for permission to have the testimony of several witnesses read back, including the testimony of petitioner and of Mr. Knight. The

judge advised the jury of the difficulties involved in having testimony reread, and told the jurors to reconsider their request. After conferring further the jury asked that only the transcript of the Chare Knight testimony be reread.

The judge agreed. Unfortunately, the judge and petitioner's counsel were absent from the courtroom while Mr. Knight's testimony was beign repeated. As agreed by petitioner's attorney, an investigator who worked with the attorney was present, as was petitioner herself.

The second witness with whom we must concern ourselves was petitioner's niece, Christine Brandon. Ms. Brandon testified that approximately four months before she took the stand she had been hypnotized at the instance of the prosecutor to help refresh her memory. The defendants had been provided with two transcripts of statements that Ms. Brandon had given the police prior to undergoing hypnosis. Defense counsel could not show any matermil inconsistancies between Ms. Brandon's testimony at trial and the statements she gave before being hypnotized.

Ms. Brandon's testimony dealt with conversations she had had with her aunt and with an individual identified as "Charles." Prior to the murder petitioner ahd spoken to her niece several times about her marital difficulties and about

consultations with a spiritualist known as "Mother Mary" or "Reverend Mary." Acting upon advice from Mother Mary, as petitioner was said to have told Ms. Brandon, petitioner had sprinkled some of her husband's urine on his food and had written his name several times on a piece of paper which she put in her shoe. Mother Mary was supposed to have recommended these actions to petitioner as means of winning back her husband's affections. Also at Mother Mary's suggestion, petitioner told Ms. Brandon, petitioner arranged to have her husband beaten up.

A few days before the murder, Ms. Brandon testified, she received a call from petitioner. "She said that she had found someone to beat up Elwood [her husband]. She said it took'em all day long. They drove all day long to find someone to beat him up, and that no one would suspect it because they would drive a big luxury car." The night before the murder, accordign to Mr. Brandon, petitioner called Ms. Brandon to see if Elwood was with her. Ms. Brandon said he was not. A few hours later Ms. Brandon called petitioner back. Ms. Brandon "asked her if Elwood had gotten there, and she said yes, he is here, and really couldn't talk and she hung up." The next morning Ms. Brandodn received a call from petitioner informing her that Mr. Perry had been killed. In subsequent conversatrions with her aunt, after the

police investigation of the murder was underway, Ms. Brandon said she was told "not to talk to Sergeant Ericson, he was just out to hang her neck."

Once when Ms. Brandon was at her aunt's house she answered the phone and an individual who identified himself as "Charles" asked to speak with Mrs. Perry. Petitioner "flagg[ed] her hands back" indicating that "[s]he didn't want to talk." Ms. Brandon told the caller that Mrs. Perry "has had a bad day and she reall don't feel like coming to the phone," to which the caller replied "if she can play that way, I can too." Ms. Brandon testified that petitioner then "panicked and said that we had to get out of here." Thereafter "Charles" began calling and menacing Ms. Brandon at her home in his attempts to reach Mrs. Perry. Frightened by the calls, Ms. Brandon turned to the police and gave them the number Charles had given her.

Petitioner took the stand in her own defense. She contended that she never arranged to have her husband killed, and although she did have him beaten up, this was only intended to "humble" him. Petitioner maintainted that she had no advance knowledge of her husband's assailants breaking into the house. Only after she was awakened by the gunshots, she said, did a person appear in her bedroom and demand money. She testified that she left some money on a chair before running into her

husband's bedroom where she found him bleeding. Because the telephone had been "pulled to the side," she went to her neighbor's house to call the police.

The remaining evidence is not directly pertinent here, but after hearing all evidence the jury found petitioner guilty of both second-degree murder and conspiracy to commit the murder. Petitioner appealed her convictions to a Michigan Court of Appeals. That court vacated the conviction for conspiracy on the ground that it is impossible to conspire to commit murder in the second-degree, but the murder conviction itself was upheld. People v. Perry, 115 Mich. App. 533, 321 N.W.2d 719 (1982); People v. Jackson, 114 Mich. App. 649, 667, 319 N.W.2d 613, 620 (1980), rev'd sub nom. People v Bladel, 421 Mich. 39 (1984), aff'd sub nom. Michigan v. Jackson, 475 U.S.625 (1986).

In a subsequent state appellate proceedings the Supreme Court of Michigan twice directed the Court of Appeals to reconsider the propriety of admitting Ms. Brandon's hypnotically-refreshed testimony. People v. Perry, 417 Mich. 908, 330 N.W.2d 852 (1983), 422 Mich. 882, 367 N.W.2d 68 (1985). Each time the Court of Appeals affirmed the conviction, holding (a) that Ms. Brandon's hypnotically refreshed testimony was reliable because it was consistent with her statements prior to hypnosis, and (b) that even if the consistency

failed to establish reliability, introduction of the testimony was harmless error because it was cumlative to other testimony presented at trial. People v. Perry, 126 Mich. App. 86, 337 N.W.2d 324 (1983); 144 Mich. App. 420; 375 N.W.2d 10(1985). Petitioner sought review in the Michigan Supreme Court a third time, but leave to appeal was denied. petitioner then brought the present federal actionfor a writ of habeas corpus. The district court denied the writ. On appeal petitioner advances ten arguments as to why the district court erred.

II

Half of petitioner's arguments concern the testimony of Chare Knight, as given at the preliminary examination and subsequently read to the jury at petitioner's trial. The first assignment of error relates to the fact that the court reporter did not actulally transcribe the reading of the preliminary examination transcript, but simply relied on the original transcript.

The Michigan Court of Appeals described this issue, and disposed of it, as follows: "[D]efendant's contention that a determination cannot be made from the trial transcript as to which portions of the preliminary examination testimony was read at trial is without merit." Perry, supra, 321 N.W.2d at 721.

Its review of the trial transcript led the court of appeals "to conclude that the entire preliminary examination testiomony of Chare Knight was read to the jury." Id. While commenting that "the better practice may have been to re-transcribe the prelimary examination testimony as it was read at the trial," the court could not "say that reversible error occurred because this was not done." Id. The court also noted that "a strong argument could be made that defense counsel waived re-recording by the court reporter of the preliminary examination testimony since the parties obviously had to be aware that the court reporter was recording the preliminary examination testimony." Id.

We find no flaw in the Michigan court's decision on this point.. A defendant has no constitutional right to a verbatim transcript. If an opportunity to obtain appellate review is mandatory, all that is required is a record of "sufficient completeness" to allow presentation of the appellatn's claims. Schwander v. Blackburn, 750 F.2d 494, 497-8 (5th Cir. 1985). Having read the trial court's direction on the reading of the preliminary examination transcript, we conclude that almost all of the transcript was read to the jury. It is possible that a certain colloquy between attorneys was omitted, see Perry, supra, 321 N.W.2d at 721 n. 1, but there could have been no prejudice to petitioner whether or not

the colloquy was read.

III

Petitioner's second argument is that the re-reading of Chare Knight's preliminary examination testimony to the jury in the absence of the judge and petitioner's attorney and without a court reporter being present constituted a denial of due process.

It is not acceptable practice for the judge to be absent when any evidence is being read or submitted ot the jury. Under the totality of the cicumstances presented here, however, and in the absence of any demonstration of prejudice ot petitioner, the error did not fatally taint the trial.

As to the absence of petitioner's attorney, this court has held:

> "Where the Sixth Amendment claim is the denial, rather than the ineffective assistance, of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a matter of law, and prejudice is presumed."

Green v. Arn, 809 F.2d 1257, 1263 (6th Cir), vacated on other grounds, 108 S>Ct. 52 (1987), reinstated 839

F..2d 300 (6th Cir. 1988). The relevant inquiry, then, is whether petitioner's counsel left during a "critical" stage in her trial.

In Green, we held that counsel's absence during the cross-examination of a prosecution witness was prejudicial per se and that therefore harmless error analysis was inapplicable. We also noted that "some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance." 809 F.2d at 1261. Suggested circumstances to which harmless error analysis would be appropriate were preliminary hearings, jury deliberations, and return of the verdict.

In the case at bar it does not seem to us that the rereading of transcribed testimony to the jury after submission of the case for deliberation represented a critical stage in petitioner's trial. Although she and a represenative of her attorney were both present in the courtromm while the prosecutor reread Knight's testimony, petitioner has not suggested that anyone in the courtroom did anything improper. She has not demonstrated any prejudice whatever, and the harmless error rule therefore controls this branch of petitioner's case.

IV

Petitioner's third assignment of error relates to

the jury's request that the testimony of five witnesses, including petitioner, be reread. The judge told the jurors that the reporter's notes had not been transcribed and it would take some four days to recreate what was said. He nevertheless advised the jury that

> "[i]f you absolutely have to have it, we could do that, but I would ask you to continue your deliberations. * * * As I say, if you get into it, it is four days. . . that you would sitting, listening to testimony being read back, so I would ask that before we do that, you see that if among the twelve of you discussing the testimony you can conclude what was said. If after a day or so you find you can't, then you make your request again and we will make the necessary arrangements to read the testimony to you. I remind you that you will be listening about three and a half to four days, but you may have if after you have talked some more among yourselves you absolutely need it. Send me another note on it an we will proceed."

On the following day the jury sent the judge a note asking that only the testimony of Chare Knight be reread.

Petitioner claims that it was improper to reread Mr. Knight's testimony alone, because the "most damaging testimony was not balanced by the

re-reading of the testimony of the defendant, that which the jury had asked for on the previous day." The judge has broad discretion as the the rereading of trial testimony, however, United States v. Toney, 440 F.2d 590, 592 (6th Cir. 1971); United States v. Licavoli, 725 F.2d 1040, 1049 (6th Cir.), cert. denied sub nom., Calandra v. United States, 467 U.S. 1252 (1984), and there was no abuse of discretion amounting to constitutional error here.

V

Petitioner's fourth assignment of error concerns a portion of Chare Knight's preliminary examination testimony dealing with what Robert Jackson said after the crime. Knight testified that Jackson told him that he and a partner had gained entry to the Perrys' house by prying open a garage door, after which Jackson shot and killed Mr. Perry. The intruders then went to Mrs. Perry's bedroom and got some money from her before leaving.

Petitioner's attorney had originally objected to this testimony as hereasy. The objection was sustained at the preliminary examination, but the offending testimony was nevertheless read to the jury at the time of trial. Petitioner claims that this violated her Sixth Amendment right to confront Robert Jackson.

Petitioner's argument must fail for two

reasons. At trial her attorney failed to object to the reading of this portion of the transcript. The Michigan Court of Appeals therefore declined to address the issue on the merits, and there has been no showing of "cause and prejudice" that would allow us to reach the merits under the rule of Wainwright v. Sykes, 433 U.S. 72 (1977).

Second, petitioner would not prevail even if we could reach the merits. Ohio v. Roberts, 448 U.S. 56 (1980), teaches the introduction of hearsay does not violate the Confrontation Clause of the Constitution if it can be shown that the declarant is unavailable and that the hearsay has sufficient indicia of reliability to comport with the "substance of the constitutional protection." 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1985)). The record before us indicates that Robert Jackson, the declarant, was unavailable to testify at petitioner's trial because he himself was being prosecuted and he declined to take the stand. His declarations were statements against interest, and this was a sufficient indicium of reliability to pass constitutional muster.

VI

Petitioner's fifth assignment of error rests on a claim that the trial court coerced Chare Knight into declining to testify by threatening to charge him with

perjury should his testimony prove to be false. As noted earlier, Mr. Knight had entered into a plea bargain under which he was to testify at the preliminary examinatiion and at petitioner's trial. Prior to the trial Knight withdrew his plea of guilty and asserted his Fifth Amendment right to remain silent. Knight subsequently indicated that althought his attorney advised against it, he would testify at petitioner's trial. Before the judge allowed Knight to testify, he made sure that Knight understood that anything he said could be used against him in his own trial and that he could be prosecuted for perjury if he did not testify truthfully. Mr. Knight then decided not to testify.

Petitioner contends that the judge's warnings to Knight violated her due process rights as defined by Webb v. Texas, 409 U.S.95 (1972). When the defendant in Webb called his only witness, a convict with a prior criminal record, the judge, on his own initiative, undertook to admonish the witness that if he lied on the stand he would be subject to perjury charges and his chances for parole would be jepordized. After the judge made his comments, the witness decided not to testify. The Supreme Court held that it was a denial of due process for the trial judge gratuitously to single out this witness for a lengthy admonition on the dangers of perjury.

Petitioner's case is readily distinguishable from

Webb. Here the judge had every reason to warn Knight about the dangers of committing perjury. The fact that Knight had withdrawn from his plea bargain and was probably getting ready to contradict his preliminary examination testimony made it incumbent upon the judge to make sure Knight understood the predicament he was in - especially when Knight's own attorney did not want him to testify.

VII

Petitioner's sixth assignment of error concerns the admission of the hypnotically-refreshed testimony of the niece, Ms. Brandon. The petitioner argues that under hypnosis a witness is susceptible to suggestion from the prosecution. Furthermore, by bringing to the jury's attention that Ms. Brandon had undergone hypnosis, the prosecution is said to have bolstered her credibility improperly.

Rulings by a state court on the admissiblity of evidence are not normally reviewable in federal habeas proceedings unless "fundamental fairness" has been impugned. Burks v. Egeler, 512 F.2d 221, 223 (6th Cir. 1975), cert. denied 423 U.S. 937 (1975). The admission of the post-hypnosis testimony here cannot be said to have impugned fundamental fairness. See Rock v. Arkansas, 483 U.S. __, 97 L.Ed.2d 37 (1987), where the Supreme Court held a

state rule excluding all post-hypnosis testimony impermissibly infringed on the right of a defendant who had undergone hypnosis to testify on her own behalf. In arriving at its conclusion the Supreme Court noted that it is ofter possible to minimize the dangers of hypnotically-refreshed testimony:

> "Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions." 97 L.Ed.2d at 52.

Petitioner's counsel was able to cross-examine Ms. Brandon in our case. The witness' testimony was corroborated by other evidence, and as the Michigan Court of Appeals noted, her post-hypnosis testimony did not vary significantly from her pre-hypnosis testimony. The hypnotist was present at the trial, and petitioner thus had an opportunity to call him as a witness. There is no contention that any cautionary instructions requested by the petitioner were not given to the jury. The danger that the jury was seriously misled does not seem excessive.

VIII

Petitioner's seventh claim of error is premised on an allegation that the jury was given an erroneous definition of malice. The trial court instructed the jury that "[m]alice means that the defendant intended to kill or that she knowingly created a very high risk of death with knowledge that it probably would result in death and that she did so under circumstances which would not justify, excuse, or lessen the crime." Noting that in People v. Aaron, 409 Mich. 672, 728 (1980), the Supreme Court of Michigan stated that malice is "the wanton and willful disregard fo the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm," petitioner areues that the instruction given at her trial was not only erroneous but a due process violation under In re Winship, 397 U.S. 358 (1970). We are not persuaded. "A federal court is not free to issue a writ of habeas corpus 'on the basis of a perceived error of state law,'" Smith v. Sowders, 86-6117 (6th Cir. June 8, 1988) (quoting Pulley v Harris, 465 U.S. 37, 41 (1984)), and even if we perceived an error of state law - which we do not - the fact remains that petitioner's counsel never objected to the instruction in question. If the instruction was erroneous, moreover, the error was not of constitutional magnitude.

IX

Petitioner's eighth assignment of error relates to her conviction of conspiracy to commit second-degree murder. That assignment of error is moot since the Michigan Court of Appeals has vacated the conspiracy conviction.

X

Petitioner's ninth assignment of error is based on the assertion that during closing argument the prosecutor vouched for the credibility of prosecution witnesses, testified to matters not in the record, and suggested that a prosecution witness feared retribution at the hands of the defendant.

In Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir.) cert. denied, 444 U.S. 936 (1979), this court held that to warrant habeas relief "[p]rosecutorial argument must be so egregious so as to render the entire trial fundamentally unfair." In Cook, a "persistent ad hominem attack on the petitioner's character . . . pervade[d] the closing argument."

> "The prosecutor continually portrayed petitioner as a low life who had to be kept from society. In a moment of eloquence rivaled only by a fire and brimstone orator, the

> prosecutor exclaimed that the petitioner was worse than all of the 'criminals' and 'traitors' in hell. A central theme of the prosecutor's argument was that the petitioner, who had been previously convicted of forgery and grand larceny, was trying to 'forge' and 'steal' justice by 'conning' the jury with a made-up story." "Id. at 119-120."

Although we observed that "[t]aken as a whole, this closing argument was clearly improper," we nevertheless held that the petitioner was not deprived of a fair trial. The statements of which petitioner complains here were far less outrageous than those in Cook, and we do not believe that they deprived petitioner of a fair trial.

XI

Petitioner's last argument is that she is entitled to relief because of the supposed ineffectiveness of her counsel at trial. Under Strickland v. Washington, 466 U.S. 668, 687-691 (1984), this argument clearly has no merit.

The judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILDRED PERRY,

Plaintiff

vs. C.A. No. 86-CV-60250-AA

CAROL HOWES, HON. GEORGE LaPLATA

Defendant.
_____/

ORDER DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS

I. INTRODUCTION

On January 30, 1980, Petitioenr, Mildred Perry, was convicted by a Wayne County Circuit Court jury of second degree murder and conspiracy to commit second degree murder. Sentenced to two concurrent terms of life imprisonment, Petitioner appealed as of right to the Michgian Court of Appeals, which affirmed the murder conviction, but vacated the conspiracy conviction.[1] On two occasions, the

1/ People v. Perry, 115 Mich. App. 533, 321 N.W.2d 719 (1982).

Michigan Supreme Court remanded the case to the Michigan Court of Appeals, which affirmed the convictions, finding that the admission at trial of hypnotically induced testimony did not warrant a new trial.[2]

II. PETITION FOR HABEAS CORPUS RELIEF

In an application for a writ of habeas corpus filed on April 22, 1986, Petitioner raised ten issues, contending that her conviction and sentence are constitutionally infirm. The ten claims are as follows:

1. Insufficient evidence was adduced by the prosecution to support a second degree murder conviction;

2. She was deprived of her due process rights when preliminary examination testimony of an unavailable witness was reread to the jury during their deliberations in the absence of the trial judge and defense counsel;

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2/ People v. Perry, (On Remand), 126 Mich. App. 86, 337 N.W.2d 324 (1983), and People v. Perry, (On Second Remand), 144 Mich. App. 420; 375 N.W.2d 10 (1985). On March 5, 1986, the Michigan Supreme Court denied Petitioner's application for leave to appeal.

3. The format employed by the judge in rereading testimony was violative of her due process rights.

4. She was deprived of her rights of confrontation and cross-examination when hearsay evidence was admitted into evidence at trial;

5. The trial court coerced a witness into invoking his Fifth Amendment right not to testify;

6. A witness was improperly permitted to testify after her memory was aided by hypnosis;

7. The trial court gave an erroneous instruction on the definition of malice;

8. The trial court erroneously instructed the jury on the crime of conspiracy to commit second degree murder;

9. The prosecuting attorney committed several acts of prosecutorial misconduct; and

10. She was deprived of the effective assistance of trial counsel.

## III. FACTUAL SETTING

Petitioner and a co-defendant, Robert Jackson,

were prosecuted in a joint trial with separate juries for the fatal shooting of her husband, Rothbe Perry.[3] The trial of two other co-defendants, Michael White and Clare Knight, were severed from the trial of Petitioner and Jackson.

IV. SUFFICIENCY OF THE EVIDENCE CLAIM

Petitioner raises the novel claim that the transcript of the trial proceedings do not contain sufficient evidence of proof of a second degree mruder charge because vital evidence, the preliminary examination testimony of a witness, Clare Knight, which was read into evidence, was not transcribed by the court reporter at trial. Additionally, four tape recordings that were read into evidence were not transcribed.

A review of the record divulges that the entire preliminary examination testimony of Clare Knight was read to the jury. It is noteworthy that no objection was made by Petitioner as to the failure of the court reporter to transcribe the previously recorded testimony. With the testimony, it cannot be seriously challenged that ample proof was presented

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3/ Robert Jackson's conviction was upheld by the Michigan Court of Appeals in People v Jackson, 114 Mich. App. 649, 319 N.W.2d 613 (1982), but reversed by the Michigan Supreme Court, 421 Mich. 39 (1984).

by the prosecution to warrant the second degree murder conviction.

## V. DUE PROCESS CLAIM REGARDING REREADING OF TESTIMONY

Following the completion of proofs and delivery of the jury instructions, the jury requested that the preliminary examination testimony of Knight be reread to them. Neither the trial court nor defense counsel was present during the rereading phase of the trial, but an investigator of Defendant was in attendance. No objection was interposed by defense counsel concerning the trial judge's absence. Although it would have been preferable for the trial judge to be in court while the testimony of Kinght was reiterated, no constitutional infirmity ensued by his absence. See People v. Kimbrough, 193 Mich. 3301 159 N.W. 533 (1916). Similarly, the absence of defense counsel did not render the proceeding unfair, particularly in light of the attendance of the attorney's assistant.[4]

## VI. ATTACK ON TRIAL COURT'S DECISION ON REQUEST FOR THE REREADING OF TESTIMONY

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4/ For a similar result, see People v. White, 144 Mich. App. 698, 376 N.W.2d 184, 187 (1985).

During their deliberations, the jury requested that the testimony of five witnesses be reread. Because the testimony thitherto had not been transcribed, the trial judge instructed the jury to commence deliberating. Upon a second request of the jury, the judge permitted the preliminary examination testimony of Knight to be reread. Petitioner asserts that she was deprived of a fair trial by the trial judge's decision not to reread testimony of four witnesses to the jury.

Under federal law, the decision whether to reread testimony is assigned to the discretion of the trial judge. United States v. Toney, 440 F.2d 590, 592 (6th Cir. 1971); United States v. Licavoli, 725 F.2d 1040, 1049 (6th Cir. 1984).[5] In the matter at bar, Petitioner was not deprived of a federal constitutional right by the trial court's refusal to permit the jury to rehear the testimony of four witnesses.

## VII. RIGHT OF CONFRONTATION CLAIM

Petitioner maintains that she was denied her

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5/ Under Michigan law, while a trial judge has discretion whether to grant a rereading of testimony request, he may not advise the jurors that they will be foreclosed from rehearing the requested testimony. People v. Howe, 392 Mich. 670; 221 N.W.2d 350, 353 (1974), People v. Robbins, 132 Mich. App. 616, 347 N.W.2d 765, 767 (1984).

rights of confrontation and cross-examination by the admission of hearsay statements of her co-defendant, Robert Jackson, which were introduced by way of the preliminary examination transcript of Clare Knight. Petitioner neither objected to the testimony at the preliminary examination nor at trial. Under state law, Petitioner waived appellate review of the issue by failing to object at the trial court level. People v. Richards, 150 Mich. 434, 114 N.W. 230 (1907); People v. Smith, 420 Mich. 1, 360 N.W.2d 841, 844 n.3 (1984). Likewise, this Court refuses to consider the issue, because a review thereof would reward a Defendant for his or her election not to object to hearsay testimony. Additionally, Petitioner has not proffered a justification for her procedural default.

## VIII. CLAIM OF TRIAL COURT'S COERCION

Prior to trial, co-defendant Jackson agreed to testify against Petitioner as part of a plea bargain. He thereafter reneged on his promise, withdrew his guilty plea, and proceeded to trial. At Petitioner's trial, he again was indecisive as to whether he desired to testify. His attorney informed the court that he would be required to withdraw if Jackson testified. Following the trial judge's admonition on the penalties for perjury, Jackson made an inexorable

decision not to testify.

Petitioner claims that Jackson was deterred from testifying on account of the trial court's coercion, resulting in a denial of due process. Unlike the occurrence in Webb v. Texas, 409 U.S. 95 (1972), the trial judge herein did not effectively prevent the witness from testifying. Under the circumstances, where the witness was mercurial with respect to whether he should testify, it was appropriate, if not mandatory, for the trial court to warn him of the pains of perjury. It is noteworthy that Jackson was a prosecution, rather than defense, witness.

## IX. USE OF HYPNOTICALLY ENHANCED TESTIMONY

At trial, Christian Bradon, testified with respect to inculpatory statements made to her by Petitioner subsequent to the homicide. Bradon was permitted to testify even though her testimony was enhanced by hypnosis.

Bradon that her testimony was substantially similar to statements she made to police officers prior to undergoing hypnosis. Additionally, her testimony was corroborated by other witnesses. Despite the fact that the hypnotist was present at trial, Petitioner declined to present him as a witness. The hypnotic session was videotaped and available for viewing by the finder of fact, but no request was

made for the playing of the tape. As the Michigan Supreme Court noted in People v. Nixon, 421 Mich. 79, 364 N.W.2d 593, 599 (1984), "the fact that a prosecution witness has been hypnotized does not automatically preclude effective cross-examination." In People v. McIntosh, 142 Mich. App. 314, 370 N.W.2d 337 (1985), the Michigan Court of Appeals permitted the posthypnotic testimony of a prosecution witness:

> On the basis of this analysis, we conclude that the trial court in this case also did not abuse its discretion, either in permitting Kelly Faulkner to testify or in permitting her to testify to the "identification" of defendant which occurred nine months after she had been hypnotized. As found by the trial court, Faulkner's pre- and posthypnotic descriptions of the men were almost identical and, because the police had no suspects at the time of the hypnotic session, there was little likelihood that the police officer "suggested" a description to Faulkner. Although the danger of "confabulation" still existed, the tentative nature of Faulkner's "identification" lessened this danger. Finally, as also noted by the trial court, eight months elapsed between the hypnosis and the line-up. We, therefore, conclude that the identification itself was based on facts recalled and related prior to hypnosis so that it was admissable at trial.

Consequently, the Court holds that the trial court did not err in permitting Braden to testify.

X. JURY INSTRUCTION ATTACK

Petitioner asserts that the trial court's definition of malice, a necessary element of second-degree murder, resulted in the burden of proof shifting to her to establish that she did not intend to kill Rothbe Perry. Reading from a standard criminal jury instruction, C.J.I. 16.02, the trial court charged the jury that:

> Fourth, for a murder, you must find that the defendant consciously and knowingly performed the act that caused the death. The defendant must have either intended to kill, that is, she must have done the act intending it would result in death or in great and serious bodily harm, or she must have knowingly created a very high risk of death with knowledge that it would probably cause death.

The above-quoted passage of the jury instructions discloses that the trial court properly defined the term "malice" for the jury. The jury was adequately and fairly apprised that the prosecution bore the burden of proof of demonstrating that Petitioner intended to slay the victim or create a degree of risk of death.

## XI. CONSPIRACY TO MURDER INSTRUCTION

Since the Michigan Court of Appeals vacated Petitioner's conspiracy conviction, her quarrel with the trial court's instructions has been rendered moot.

## XII. PROSECUTORIAL MISCONDUCT CLAIMS

Petitioner maintains that she was deprived of a fair trial by three acts of misconduct of the prosecutor. Specifically, she complains of his (1) vouching for the credibility of a prosecution witness; (2) arguing facts that were not in evidence; and (3) alluding to a witness's fear of Petitioner as a basis for refusing to testify.

An examination of the record reveals that the claimed prosecutorial misconduct does not reach the level of a federal constitutional violation. The conduct was not sufficiently blatant to the extent that the trial was unfair. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The trial court instructed the jury that arguments of counsel are not to be considered as evidence. The conduct of prosecution, if improper, was harmless.

## XIII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Petitioner refers to several segments of the trial where she contends her trial counsel erred. A

review of these instances leads the Court to conclude that she woefully has failed to demonstrate that she was deprived of the effective assistance of counsel. Applying the precepts contained in Strickland v. Washington, 466 U.S. 668 (1984), the Court finds that Petitioner did not show that the purportedly deficient performance of her counsel deprived her of a fair trial.

## XIV. CONCLUSION

Petitioner's application for a writ of habeas corpus is DENIED. Petitioer was afforded a fair trial, where she was zealously and capably represented by counsel. Strong, competent evidence was adduced to establish, beyond a reasonable doubt, that she, with malice aforethought, deprived Rothbe Perry of the utmost liberty, his right to live. With this decision, Petitioner has been afforded a multitude of checks on the state power to charge her with capital crimes: a trial by twelve of her peers, three decisions of a three member panel of the Michigan Court of Appeals, three reviews by the Michigan Supreme Court, and a review by a United States District Court.

GEORGE LaPLATA
U. S. District Judge

November 18, 1986
Ann Arbor, MI